Modernising the United Kingdom's Official Secrecy Laws

Ashley Savage 2021-08-08T16:25:48

In the United Kingdom, proposals to reform official secrecy laws could have damaging implications for journalistic expression, whistleblowing and government transparency. Some allege that journalism could be recast as spying. However, the situation is more complex than that. At present, there are three Acts which deal with espionage offences. These are contained in the Official Secrets Acts 1911, 1920 and 1939, The Official Secrets Act 1989 deals with unauthorised disclosure offences, so called 'leaks' of information. The Home Office consultation, which closed on 22 July 2021, draws upon recommendations from the UK's Law Commission, a statutory independent body tasked with law reform. It aims to modernise the laws to meet the threats of modern times, namely increased hostile state activity and the increased risk of unauthorised disclosures caused by advancements in technology. The Home Office argue that the "unprecedented developments" in technology mean that a leak could have the same impact as espionage. A document leaked and then published online could be accessed by hostile states, and thus the effect is the same.

Whether intended or not, the Home Office are suggesting that maximum sentences for unauthorised disclosure be increased. This is not a full-frontal attack on journalists, but it is obvious that journalists will be directly affected by this change. Journalistic organisations and online disclosure outlets such as *Wikileaks* are most likely to be in the firing line because they are the actors most likely to publish and disseminate the information. The proposals therefore have a direct impact on the right to journalistic expression which is well-established in the jurisprudence of the European Court of Human Rights. If not rectified, the Home Office proposals could lead to a situation whereby a law which prohibits whistleblowers from going outside of their organisation, and is thus incompatible with Article10 ECHR, could be replaced with an even worse law, which inhibits expression, and prevents journalists from lawfully reporting on important matters of public interest.

Background

The Official Secrets Act 1989 Act was intended to be more tightly drafted than the s.2 Official Act 1911 it replaced: It removed the ability for persons who make an unauthorised disclosure to claim that they were doing so in the public interest. It therefore prevented whistleblowers from raising concerns outside of their organisation to persons not authorised to receive the information. The availability of authorised channels, which include the Commissioner of the Metropolitan Police and the Prime Minister (to name two) has always been questioned. From day one, the law has arguably failed to provide access to a safe authorised whistleblowing channel with the ability to investigate and rectify allegations of wrongdoing. There is a clear difference between "availability"; the authorisation to make a disclosure to a

person or organisation in law, and “feasibility”; the practicalities of reporting security sensitive information, the existence of whistleblowing policies and procedures and the protections (employment law, safeguards against actions in civil law breach of confidence or prosecution by the criminal law) available to persons who make reports.

The Official Secrets Act 1989 criminalises the disclosure of official information without authority. Section 1 of the Act contains a ‘catch all’ strict liability offence for members of the security and intelligence services and persons notified by the Secretary of State (such as members of the Intelligence and Security Committee of Parliament) who disclose security and intelligence information. In contrast, sections concerning defence, international relations, information resulting from unauthorised disclosures or entrusted in confidence and information entrusted in confidence to other States or international organisations require proof of damage. Whilst the wording of the individual sections differ, they follow along similar lines. For example, section 2, which concerns the unauthorised disclosure of defence information, states that:

“…a disclosure is damaging if—

(a) it damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or

(b) otherwise than as mentioned in paragraph (a) above, it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or

(c) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.”

It is this proof of damage which makes prosecution under the Act impractical and undesirable. Leaks concerning official secrets often attract media attention and a subsequent criminal trial will fuel the already intense media scrutiny. There is a strong reluctance to try cases because to do so requires the disclosure of evidence which could reveal information even more damaging than the original leak. As a consequence, there have been very few prosecutions under the 1989 Act.

The strength of the law is in its symbolism. Crown servants are required to ‘sign’ the Official Secrets Acts, despite all persons being subject to the provisions, regardless of whether they sign or not. The categories of information protected by the 1989 Act are broad, and the way that they are used to assess damage bears little resemblance to the levels of security classification attached to official information. Whilst the reality of prosecution is unlikely, the threat of prosecution remains ever present, particularly to those without an in-depth knowledge of the law. All of this creates a state of ambiguous uncertainty. Crown servants may be deterred from blowing the whistle because of fears of the unknown consequences of doing so.

While civil servants have access to internal whistleblowing mechanisms, these differ from department to department. The Civil Service Code provides little clarity on the circumstances of when it is permitted to go outside of the organisation. The Public Interest Disclosure Act 1998 (PIDA), the UK's whistleblowing law, protects disclosures to the media and public in certain defined circumstances, but does not apply to members of the security and intelligence services and armed forces. So what about other Crown servants, such as members of the Civil Service and the Police, who are protected by PIDA? The interaction between PIDA, which is a part of employment law, and the Official Secrets Act 1989, which is part of the criminal law, is unclear. PIDA does not protect whistleblowers who breach the Official Secrets Act from prosecution. Instead, per s.43B(3) PIDA, the law's protections do not apply when the person making the disclosure commits a criminal offence. Crown servants who are arrested for Official Secrets Act offences must wait for proceedings to conclude before they can bring a claim. This situation is far from satisfactory. Reform is required to not only bring the Official Secrets Act 1989 up-to-date but to entirely re-balance and clearly define the rights and responsibilities of Crown Servants in handling official information. However, this must not result in a disproportionate restriction of their Article 10 ECHR rights to freedom of speech.

The Home Office Proposals

In 2017, the Law Commission published a detailed consultation paper on the protection of official data. The paper provided a number of provisional conclusions and became the subject of fierce criticism from NGOs, media outlets, lawyers and academics who were concerned that there could be severe consequences for journalists and whistleblowers. At the time, the Law Commission were not convinced that the Official Secrets Act 1989 was incompatible with Article 10 ECHR. Instead it had made suggestions to increase penalties without sufficiently considering the need for a public interest defence and other safeguards to allow for proportionate public interest expression. In 2020, the Law Commission published a second report, which appeared to take on board many of the criticisms of the first report, yet, concerns still remain.

The Government supports the Law Commission's proposal to no longer require proof or likelihood of damage for all offences which currently contain a test for damage, except sections 5 and 6 where the damaging disclosure tests would remain. Instead, the sections would be reliant upon a 'subjective fault' test. This would shift the emphasis to the conduct of the person disclosing the information (for example, whether they committed the act intentionally or recklessly, although the precise terminology is yet to be decided) rather than on whether the disclosure actually caused harm. Whilst this could help to solve the challenge of trying official secrecy cases in open court, it presents a danger that persons could be prosecuted for disclosing documents which are more harmful to the reputation of those in government than to national security.

Not surprisingly, the Law Commission noted in its second report that several consultees raised issues with the removal of proof of damage. It sought to allay their fears by stating that:

"It is our view that the majority of these concerns will have been addressed by fortifying and balancing this recommendation with the public interest disclosure recommendations that we make later in the Report."

The Home Office considered the Law Commission's proposals for a public interest defence and for the establishment of a statutory commissioner to receive disclosures. However, the government is of the belief that the existing secrecy offences are compatible with Article 10 ECHR and such proposals could undermine "efforts to prevent damaging unauthorised disclosures." Overall, the government is of the opinion that the current whistleblowing mechanisms are adequate.

Without question, the government were heavily influenced by the findings in *R v Shayler*, whereby the House of Lords found that the defendant had opportunities to raise concerns via a number of authorised channels but failed to do so. These authorised routes were seen to be sufficient to negate the need for a public interest defence and the Official Secrets Act 1989 was determined to be compliant with Article 10 ECHR as a result. The problem with this assessment is that it fails to recognise subsequent case law from the European Court of Human Rights, and in particular *Bucur and Toma v Romania*, which determined that a member of the intelligence services could be permitted to make a disclosure to the media where the reporting mechanisms available were ineffective. In fact, the Law Commission recognised in its second report that there is a real possibility that *Shayler* would be decided differently today. Therefore, the UK government should take the proposal of a codified public interest defence much more seriously.

The Home Office proposals identify that they will review the current arrangements to raise concerns in order to assess the Law Commission's proposals for a 'Statutory Commissioner.' This is a welcome development and long overdue, particularly as the Law Commission questioned the current mechanisms' effectiveness to investigating wrongdoing. What is most important is that whistleblowers have the ability to raise concerns to an independent body external to their organisation. In *Shayler* for example, it was argued that the defendant could have raised a concern to the Intelligence and Security Committee of Parliament (ISC) but the Official Secrets Act 1989 made this route far from clear. It was not until the 2016-2017 Annual Report that the ISC noted that it was to be an approved route to receive staff concerns (surprisingly the Committee notes that it was not previously informed of this). However, in its 2018-2019 report it noted that the agencies had still not lifted a bar on allowing agency staff to communicate with the ISC directly via secure email. Any review of current arrangements should not just assess the existence of available mechanisms. Considerable focus must be given to the viability of making reports to them in practice and their ability and effectiveness to investigate any allegations of wrongdoing or malpractice.

The Home Office agrees with the Law Commission's assessment that there should be increased maximum sentences for breaching the Official Secrets Act. It argues that advancements in technology mean that unauthorised disclosures are capable of causing more serious damage than previously. The Home Office proceeds to state that:

“Although there are differences in the mechanics of and motivations behind espionage and unauthorised disclosure offences, there are cases where an unauthorised disclosure may be as or more serious, in terms of intent and/or damage.”

Whilst it is reasonable that a thorough review of the law should consider sentencing, the Home Office appears to use the damaging impact of disclosures as a justification for increasing sentences. In the same exercise, it is also proposing to remove the ability of the courts to assess the damage.

The Law Commission had recommended that consideration should be given to whether a distinction should be made in sentencing between the disclosure offences in sections 1-4 and sections 5 and 6, the latter two applying to everyone. The Home Office said that they did not: “*consider that there is necessarily a distinction in severity between espionage and the most serious unauthorised disclosures, in the same way that there was in 1989.*” This is most concerning, as section 5 of the Act can be used to prosecute journalists and other persons who disclose information provided to them by a Crown servant. Whilst the Home Office could have been clearer in its response to the Law Commission’s proposals, without further clarification and close scrutiny, this could have a very significant chilling effect on journalistic expression.

Conclusion

The Home Office consultation does not provide sufficient consideration to the protection of freedom of expression and, in particular, the vital ‘watchdog’ role of journalists to hold the Executive to account. These proposals are at an early stage and, just as with the Law Commission’s consultations, it is highly likely that many interested parties will be critical of the Home Office document. Reform of the United Kingdom’s official secrecy laws are long overdue but it is vitally important that they are compliant with article 10 ECHR.
